# Supreme Court of the United States

OCTOBER TERM 1951

## No. 654

EMMETT R. WARING, PETITIONER

*vs.*

RAY L. HUFF, GENERAL SUPERINTENDENT DISTRICT PENAL INSTITUTIONS

## No. 655

EMMETT R. WARING, PETITIONER

*vs.*

JOHN B. COLPOYS, UNITED STATES MARSHAL

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, WITH BRIEF IN SUPPORT THEREOF AND APPLICATION FOR BAIL.

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# Supreme Court of the United States

OCTOBER TERM, 1941

## No.

EMMETT R. WARRING, PETITIONER

*vs.*

RAY L. HUFF, GENERAL SUPERINTENDENT
DISTRICT PENAL INSTITUTIONS

## No.

EMMETT R. WARRING, PETITIONER

*vs.*

JOHN B. COLPOYS, UNITED STATES MARSHAL

## PETITION FOR WRITS OF CERTIORARI

Emmett R. Warring, petitioner, prays that a writ of certiorari be issued to review the judgments entered July 29, 1941, in the United States Court of Appeals for the District of Columbia (R. 52-53).

## JUDGMENTS BELOW

Appeals from judgments of United States District Court for the District of Columbia (R. 8-9 and 41-42).

These causes came on to be heard together from the United States District Court for the District of Columbia, and were argued by counsel (R. 43).

On consideration whereof, it is now here ordered that the orders and judgments of said District Court be and they hereby are affirmed.

## JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and under Rule 38 of the Revised Rules of the Supreme Court of the United States adopted February 13, 1939, as amended. The opinions of the United States Court of Appeals for the District of Columbia were filed July 29, 1941 (R. 44-51), and this petition was filed in September, 1941 (R. Cover). The opinions of the United States Court of Appeals for the District of Columbia are included in attached Record.

## STATEMENT OF CASE

The United States Court of Appeals for the District of Columbia affirmed the orders and judgments of the United States District Court for the District of Columbia (R. 52-53), which Court discharged writs of habeas corpus, and dismissed the petitions upon which such writs were issued (R. 8-9 and 41-42). Both habeas corpus proceedings were consolidated for the purposes of argument in the United States Court of Appeals for the District of Columbia (R. 43).

The petitioner was convicted and sentenced in the United States District Court on four different charges of criminal

contempt in alleged violation of Section 268 of the Judicial Code (R. 40-41). Appellant also was sentenced upon a plea of guilty, upon a charge of criminal conspiracy under 18 U. S. C.

The following sentences were imposed in the contempt cases on February 24, 1939, and in the criminal conspiracy case on May 2, 1939:

Contempt case number 98—sentence of 1 year and 1 month (R. 7-8 and 40).

Contempt case number 99—sentence of 6 months (to run currently with the sentence imposed in Number 98) (R.40).

Contempt Case number 100—sentence of 1 year and 1 month (to take effect at the expiration of the sentence imposed in number 98) (R. 8 and 41).

Contempt case number 101—sentence of 6 months (to run concurrently with the sentence imposed in number 98) (R. 41).

Criminal Conspiracy case—sentence of 3 to 9 months (to take effect at the expiration of the sentence imposed in criminal contempt case number 100).

Criminal Contempt case number 98 charged the petitioner with causing to be offered a prospective juror certain money with intent to unlawfully and corruptly influence the vote of a prospective juror in case he, the said juror, should be selected to serve as a juror in a pending case against petitioner. The alleged misconduct of petitioner was charged and admitted by respondent to have occurred some days before the pending trial was set, and at places within the District of Columbia, but some miles distant from the Court house (R. 24-28).

Criminal Contempt case Number 99 charged the petitioner with telephoning and talking to one Quinlan with a view towards investigating the possibility of influencing a man if he should be selected to serve as a juror in the then pending case against petitioner. It was admitted by respondent that the acts charged were alleged to have occurred some days before the pending case was commenced, and at places within the District of Columbia, but some miles distant from the Court House (R. 28-31).

All the rules to show cause and citations are contained in the appendices to the briefs filed herein (R. 24-39).

Petitioner's first petition for writ of habeas corpus was filed March 14, 1941 (R. 2). In substance it alleged that the sentences imposed in Contempt cases number 98 and 100 were void, in that the sentences should have been imposed under the terms of "An Act to Establish a Board of Indeterminate Sentence and Parole for the District of Columbia," dated July 15, 1932, sec. 453, Tit. 6, D. C. Code (1929); that since the sentences in Contempt cases Nos. 98 and 100 were void, the petitioner had already served all valid sentences imposed upon him, and he should be discharged from custody (R. 2-4). A writ was issued (R. 4-5). and on March 18, 1941, a hearing was held and the writ was discharged (R. 8-9).

Petitioner's second petition for writ of habeas corpus (R. 12-14) was filed April 30, 1941. In substance it alleged that the convictions and sentences imposed in Contempt Cases Nos. 98 and 99 were void, because petitioner was serving sentences for alleged violations of section 268 of the Judicial Code, and the alleged misbehavior upon which the charges and convictions were based were not such as under section 268 of the Judicial Code, made him liable to summary punishment; that the court did not have jurisdiction to try, convict and sentence him, because the misbehavior

charged against him did not constitute contempt within section 268 of the judicial code. It was asserted that since the convictions and sentences in Contempt Cases Nos. 98 and 99 were void, the petitioner already had served all legal sentences imposed upon him (R. 12-14). A writ of habeas corpus was issued (R. 15) and a hearing held on May 8, 1941. The trial court discharged the writ and again remanded petitioner to the custody of the Lorton Penitentiary (R. 41-42).

The pertinent record and statutes involved in each case are contained in each brief, and are prayed to be as part hereof. In the first case the statute involved was Act of July 15, 1932 (47 Stat. 697, c.492, section 3); Title 6, sec. 453, Code of Laws of the District of Columbia (1929) as amended. In the second case the statute involved is section 268 of the Judicial Code, Rev. Stat. 725, Act of Mar. 3, 1911, c. 231; 36 Stat 1163; 28 U. S. C. A. 385.

## QUESTIONS PRESENTED

1. Whether separate sentences to imprisonment in the penitentiary for terms exceeding one year imposed after convictions in alleged Criminal Contempt cases in violation of Section 268, Judicial Code, were proper, even though not imposed under the terms of "An Act to Establish a Board of Indeterminate Sentence and Parole for the District of Columbia", *supra.*

2. Whether the District Court had jurisdiction under section 268 of the Judicial Code to try, convict and sentence petitioner as for a criminal contempt, when it is admitted the alleged misbehavior was not such as made him liable to punishment after the decision of this Court on April 14, 1941, in *Nye v. United States.*

## REASONS FOR GRANTING THE PETITION

By its opinion in/on the first question, the United States Court of appeals for the District of Columbia, is in conflict with the following cases and statutes:

*Gompers v. United States*, 233 U. S. 604.
*Michaelson v. United States*, 266 U. S. 42.
*Ex Parte Grossman*, 267 U. S. 87.
*United States v. Goldman*, 277 U. S. 229.
*Creekmore* v. *United States*, 237 F. 743.
Section 335, United States Criminal Code

By its opinion on the second question, the United States Court of Appeal's for the District of Columbia is in conflict with the following cases:

*Nye v. United States*, decided by this Court April 14, 1931.
*Ex Parte Terry*, 128 U. S. 289.
*Ex Parte Cuddy*, 131 U. S. 280.
*Ex Parte Savin*, 131 U. S. 267.
*Ex Parte Lange*, 85 U. S. 163.
*Ex Parte Parks*, 193 U. S. 18.
*Ex. Parte Fisk*, 113 U. S. 713.
*Ex Parte Curtis*, 106 U. S. 371.
*Ex Parte Robinson*, 19 Wall. 505.
*Coll v. United States*, 8F. (2d) 20.

Other reasons for granting petition for a writ, or writs, of certiorari are:

1. The United States Court of Appeals has not given proper effect to applicable decisions of this Court, the latest being *Nye v. United States*, decided April 14, 1941.

2. The United States Court of Appeals for the D. C. state in their opinion that this is a question of first impression

3. These are important questions of federal law which have not been, but should be, settled by this court.

4. The United States Court of Appeals has decided questions of general importance, and questions of substance relating to construction of statutes of the United States, which have not been, but should be settled by this court.

## QUESTION I

Pretermitting the legality of the convictions, the sentences imposed in Criminal Contempt cases No. 98 and 100 are nullities in that they were not imposed under terms of the "Act to establish a Board of Indeterminate sentence and Parole for the District of Columbia."

Section 335 of the Criminal Code provides as follows:

"All offenses which may be punished by death, or imprisonment for a term exceeding one year shall be deemed felonies." All other offenses shall be deemed misdemeanors.

All of the cases decided by this court hold that Criminal Contempt is an "offense" and a crime against the United States.

In the case of *Creekmore v. United States*, 237 F. 743, the court in deciding the point in question, stated:

"There is no doubt that the defendant has been proved guilty of a criminal offense."

"Assuming that criminal contempts are offenses in the meaning of this statute (sec. 335 Criminal Code) as they are in the holding of the Supreme Court in the Gompers case, *supra* under Revised Statutes, sec. 1044, we must

either assume that a defendant may be sentenced to prison for more than a year or that a statute which provides that the defendant may be punished by imprisonment at the discretion of the Court in some mysterious way means that the discretion is limited to one year, without the thought being expressed. It will be observed that section 335, in defining felonies, said nothing about penitentiaries. *It is the length of possible imprisonment that fixes whether the offense is a felony or misdemeanor.* We see no reason why, under Judicial Code, sec. 268, the Court could not sentence a guilty party for a year and a day, and if it had this power, then sec. 335 of the Criminal Code *made it a felony.*

"It seems to be conceded that if the Court could sentence a defendant in a criminal contempt case for more than a year, and if his guilt was an offense under Rev. Stat. sec. 5541, then under that section as amended he could be sentenced to the penitentiary. The Supreme Court has held that a criminal contempt is an offense under R. S. 1044; we see no reason for holding that it is not an 'offense' under Criminal Code, sec. 335, and under Rev. Stat. sec. 5541."

We submit that the convictions in this case were for felonies, and the court should have sentenced the petitioner under the terms of the "Act to Establish a Board of Indeterminate Sentence and Parole for the District of Columbia."

Act of July 15, 1932 (47 Stat. 697, c. 492, section 3); Title 6, sec. 453, D. C. Code (1929) as amended.

**QUESTION II**

The District Court had no jurisdiction to try, convict, and sentence the petitioner as for Criminal Contempts under section 268 of the Judicial Code, in cases numbered 98 and 99, and the petitioner should have been discharged on his writ of habeas corpus.

The misbehavior with which he was charged and for which he was convicted and sentenced was not such as made him liable to punishment under that section. This Court in *Nye v. United States*, decided April 14, 1941, held that the "misbehavior so near" the presence of the Court "as to obstruct the administration of justice" within the meaning of section 268 of the Judicial Code had a geographical and not a causal connotation.

In the case at Bar, the petitioner was charged with misbehavior some miles from the Court and some days before a pending trial. In the Nye case, *supra*, this Court construed such facts not to fall within section 268, Judicial Code, and stated the matter was a jurisdictional one by using the following language:

> "The fact that in purpose and effect there was an obstruction in the administration of justice did not bring the condemned conduct within the vicinity of the court in any normal meaning of the term. It was not misbehavior in the vicinity of the court disrupting to quiet and order or actually interrupting the court in the conduct of its business. *Hence, it was not embraced within section 268 of the Judicial Code.*"

The United States Court of Appeals for the District of Columbia decided that the Nye case would be followed after April 14, 1941, but the petitioner is not entitled to relief because the Nye case should be given a prospective and not a retroactive application.

The general principle seems to be that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was the law.

It is admitted that recent decisions of this court hold that in contract cases an overruling decision should be given a prospective instead of retroactive application. Indeed, this Court in recent civil cases, has decided the question of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature of both of the statute and of its previous application, demand examination in order to determine whether an overruling decision should have a prospective or retroactive application. See *Chicot County Drainage District v. Baxter State Bank*, 308 U. S. 371.

But no cases have come to our attention which hold that an overruling decision should be given a prospective application to the detriment of a prisoner or defendant, so that he may be deprived of his liberty. It sometimes happens that a former decision is overruled to the prejudice of a defendant, but in such a case the courts are eager to relieve from the retroactive effect of the later decision, and in the few cases on the subject, have almost unanimously protected the defendant. See *State v. Bell*, 136 N. C. 674. The United States Court of Appeals in this case seems to have made the paradoxical holding that the petitioner would be entitled to release if prosecuted on or after April 14, 1941, but that his sentence is proper if he was convicted one or more days before that date. This is contrary to justice, and the prisoner should be discharged.

## CONCLUSION

Wherefore, the premises considered, your petitioner respectfully prays that a writ or writs of certiorari be issued out of and under the seal of this Court directed to the United States Court of Appeals for the District of Columbia,

commanding that court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record, and all the proceedings in cases of *Emmett R. Warring v. Ray L. Huff*, and *Emmett R. Warring v. John B. Colpoys*, and that the said judgments of the United States Court of Appeals for the District of Columbia may be reversed and for such other and further relief as to the Court may seem meet and proper.

Emmett R. Warring,
Petitioner.

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# Supreme Court of the United States

OCTOBER TERM, 1941

## No.

EMMETT R. WARRING, PETITIONER

*vs.*

RAY L. HUFF, GENERAL SUPERINTENDENT DISTRICT PENAL INSTITUTIONS

## No.

EMMETT R. WARRING, PETITIONER

*vs.*

JOHN B. COLPOYS, UNITED STATES MARSHAL

## BRIEF IN SUPPORT OF WRITS OF CERTIORARI

### OPINIONS BELOW

The opinions of the United States Court of Appeals for the District of Columbia were delivered July 29, 1941, and appear on pages 44 to 51 of the Record.

## JURISDICTIONAL STATEMENT

The statement of the grounds on which the jurisdiction of this Court is invoked is contained in the petition for writs of certiorari, *supra*, (Page 2).

## STATEMENT OF CASE

A concise statement of the case containing all that is material to the consideration of the questions presented is contained in the petition for writs of certiorari, *supra*, (Pages 2-5).

## QUESTIONS PRESENTED

The errors urged and questions presented are contained in the petition for writs of certiorari, *supra* (Pages 5-6).

## STATUTES INVOLVED

**Act of July 15, 1932 (47 Stat. 697, c 492, Section 3); Title 6, Sec. 453, Code of Laws of the District of Columbia, (1929) as amended.**

> In imposing sentence on a person convicted in the District of Columbia of a felony, the justice or judge of the court imposing such sentence shall sentence the person for a maximum period, not exceeding the maximum fixed by law, and for a minimum period not exceeding one-fifth of the maximum period fixed by law, and any person so convicted and sentenced may be released on parole as herein provided at any time after having served the minimum sentence.
>
> All acts or parts of acts inconsistent with the provisions of sections 451-458 of this title are hereby repealed.

**Section 268 of the Judicial Code, Rev. Stat. 725, Act of Mar. 3, 1911, c. 231, 36 Stat. 1163; 28 USCA 385.**

> The said Courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts.

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The summaries of arguments and arguments on each question will follow the order set forth in the petition.

## QUESTION I

> Whether separate sentences to imprisonment in the penitentiary for terms exceeding one year imposed after convictions in alleged Criminal Contempt cases in violation of Section 268, Judicial Code, were proper, even though not imposed under the terms of "An Act to Establish a Board of Indeterminate Sentence and Parole for the District of Columbia.

## SUMMARY OF ARGUMENT ON QUESTION I

The lower court erred in discharging the writ of habeas corpus, dismissing the petition for writ of habeas corpus, and remanding the appellant to the custody of the appellee, for the reason that petitioner was and is confined in the penitentiary under the alleged authority of void and illegal sentences imposed in Criminal Contempt cases, Numbers 98 and 100, and has fully served all valid sentences, imposed upon him.

The alleged sentences in the Criminal Contempt cases imposed upon appellant were not in accordance with the "Indeterminate Sentence Act", *supra,* and were and are void and of no force and effect, because being for more than twelve months each, they should have been imposed under the terms and conditions of the Act. It necessarily follows that the sentence imposed upon petitioner to take effect after the sentences in the Criminal Contempt cases had already been served, because it was ordered to take effect after the void sentences, and has been fully complied with by petitioner.

The petitioner further contends that the Criminal Contempt sentences imposed upon him are void and of no force and effect because his convictions and sentences were for felonies and he was not given "Indeterminate Sentences." The extent of the sentences imposed in the Criminal Contempt cases decided whether the petitioner was sentenced for felonies or not.

The petitioner further contends he should have been sentenced under the "Indeterminate Sentence Act", *supra,* whether his convictions and sentences were for felonies or otherwise, and the lower court having failed to do so, has forced him to be, and he is confined under void sentences, and the writ of habeas corpus was erroneously discharged.

The intent of Congress as stated in their report for the bill (Report No. 881, 1st session, 72nd Congress) establishing the "Indeterminate Sentence Act", *supra,* clearly shows the "Act" was meant to include sentences for more than twelve months, *for all crimes.*

**ARGUMENT ON QUESTION I**

Sentences which do not comply with the statute under which they must be imposed, are void and of no force and effect.

*King* v. *United States,* 69 App. D. C. 10, 98 F. 2d 291. *De Benque* v. *United States,* 66 App. D. C. 36, 85 F 2d 202.

In attempting to decide whether a sentence for Criminal Contempt under section 268 of the Judicial Code is a conviction of a felony or otherwise, it must be remembered that the statute, *supra,* under which this petitioner was convicted and sentenced does not limit the court in the extent of punishment it may impose. It seems to be settled that the extent of punishment for criminal contempt under section 268 of the Judicial Code is discretionary with the Court, but must not be excessive.

As the "Indeterminate Sentence Act", *supra,* uses the term "a person convicted of a felony", it becomes necessary to examine the statutes applicable to sentences in the District of Columbia for the definitions of crimes and felonies, in order to ascertain whether the petitioner in this case was convicted and sentenced for felonies.

Section 335 of the Criminal Code (35 Stat. 1152, Act of March 4, 1909, c. 321, sec. 335) as amended December 16, 1930, (46 Stat. 1029 c. 15) provides as follows:

> "*All offenses which may* be punished by death, or imprisonment for a term exceeding one year shall be deemed felonies. All other offenses shall be deemed misdemeanors."

It is obvious that this section included "all offenses" which are within the jurisdiction of the Federal Courts and the District of Columbia.

It is well established by the Supreme Court of the United States and the Circuit Courts of Appeals that Criminal Contempt is an 'offense' and a 'crime' against the United States.

In *Gompers* v. *United States*, 233 U. S. 604, the Supreme Court in deciding that the three years limitation prescribed by the Revised Statutes to ordinary crimes applies to criminal contempt cases, used the following language in calling Criminal Contempt an 'offense' and 'crime':

> "It is urged in the first place that contempts cannot be crimes, because, although punishable by imprisonment and therefore, if crimes, infamous, they are not within the protection of the Constitution and the amendments giving a right to trial by jury, etc., to persons charged with such crimes. But the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital, not formal; it is to be gathered, not simply by taking the words and a dictionary, but by considering their origin and the line of their growth. (*Robertson* v. *Baldwin*, 165 U. S. 275, 281, 282). It does not follow that contempts of the class under consideration are not crimes, or rather, in the language of the statute, offenses, because trial by jury, as it has been gradually worked out and fought out, has been thought not to extend to them as a matter of constitutional right. These contempts are infractions of the law visited with punishment as such. *If such acts are not criminal*, we are in error as to the most fundamental characteristic of crimes, as that word has been understood in English speech. So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure (3 Transactions of the Royal Historical Society (N. S.) p. 147, (1885), and that at least in England it seems that they still may be and preferably are tried in that way."

In *Michaelson* v. *United States*, 266 U. S. 42, the Supreme Court in deciding the Clayton Act was constitutional, on page 66, stated as follows on this proposition:

> "So truly are they crimes that it seems to be proved that in the early law, they were punished only by the usual criminal procedure, and that at least in England, it seems that they still may be, and preferably are, tried in that way. This is also pointed out by counsel in the case of *O'Shea* v. *O'Shea*, L. R. 15 Prob. Div. 59, 61; and in the course of one of the opinions in that case, it is said (p. 64): 'The offense of the appellant (criminal contempt) is certainly a criminal offense. I do not say that it is an indictable offense, *but, whether indictable or not, it is a criminal offense*, and it is an offense, and the only offense that I know of, which is punishable at common law by summary process.' The proceeding is not between the parties to the original suit, but between the public and the defendant."

In *Ex Parte Grossman*, 267 U. S. 87, the Supreme Court held that the pardoning power of the President under the Constitution extends to criminal contempts of Court. In deciding that Criminal contempts are offenses against the United States so as to be included in Article 2, sec. 2, clause 1, of the Constitution, which gives the President power to grant reprieves and pardons for offenses against the United States, the Supreme Court said:

> "Nothing in the ordinary meaning of the words 'offenses against the United States' excludes criminal contempts. That which violates the dignity and authority of Federal Courts such as an intentional effort to defeat their decrees justifying punishment, violates a law of the United States, and so must be an offense against the United States".

In the case of *United States* v. *Goldman*, 277 U. S. 229, the Supreme Court held that informations by the United States for the punishment of criminal contempts are criminal cases within the meaning of the Criminal Appeals Act, and approves the language used by the Court in the *Gompers, Grossman,* and *Michaelson* cases, *supra,* to the effect that Criminal Contempts are crimes and offenses. The Court on page 236 used the following language:

> "And we think it clear that informations brought by the United States for the punishment of criminal contempts, ** are criminal cases within the meaning of the Criminal Appeals Act, in as real and substantial a sense as ordinary criminal prosecutions for the punishment of crimes."

The case of *Creekmore* v. *United States*, 237 Fed. 743, seems to be the leading case on Criminal Contempts in the Circuit Courts of Appeals. In that case there was directly involved the proposition of whether the defendant was guilty of an 'offense' in a criminal contempt case, and further whether the lower Court had power to sentence him to the penitentiary for more than a year. The Circuit Court of Appeals decided both of these questions in the affirmative and held that Section 335 of the Criminal Code made a sentence for more than twelve months in a criminal contempt conviction a felony.

The only apparent difference between a Criminal Contempt prosecution and other Criminal cases is that the defendant in the former is not entitled to a trial by jury as a matter of right, unless the criminal Contempt statute under which he may be prosecuted, provides for same.

*Gompers* v. *United States*, 233 U. S. 604.
*Myers* v. *United States*, 264 U. S. 95.
*Michaelson* v. *United States*, 266 U. S. 42.

*Ex Parte Grossman*, 267 U. S. 87.
*United States* v. *Goldman*, 277 U. S. 229.

While many decisions hold that Criminal Contempt proceedings are regarded as *sui generis*, it seems the Courts use that expression in describing them to excuse the failure to give defendant a jury trial, even though Criminal Contempts are considered crimes and offenses, as those terms are known in our Constitution, Laws, and Common Law.

The Supreme Court in *Ex Parte Grossman, supra*, stated as follows:

> "Contempt proceedings are *sui generis* because they are not hedged about with all the safeguards provided in the Bill of Rights for protecting one accused of ordinary crime from the danger of unjust conviction. This is due, of course, to the fact that for years before the American Constitution, courts have been held to be inherently empowered to protect themselves and the function they perform by summary proceedings without a jury to punish disobedience of their orders and disturbance of their hearings. So it is clear to us that the language of the 5th and 6th Amendments and of other cited parts of the Constitution is not of significance in determining the scope of pardons of 'offenses aginst the United States' in Article 2, sec. 2, clause 1, of the enumerated powers of the President.

*Ex Parte Grossman*, 267 U. S. 87.
*Myers* v. *United States*, 264 U. S. 95.

There is little doubt that Criminal Contempts of the kind for which petitioner is incarcerated, are recognized as criminal offenses and crimes within the meaning of those terms in all our laws. There is little doubt that the only real difference between the rights of a defendant in a case of Criminal Contempt and any other Criminal case is his inability

to secure a jury trial. The reason for this is quite obvious. As the petitioner was sentenced for offenses which the courts recognize as falling within the terms of the statutes describing felonies and incarceration for them, it is respectfully urged that the lower court erred in discharging the writ of habeas corpus, and deciding that the petitioner should not have been sentenced under the "Indeterminate Sentence Act."

Independently of the felony point, it appears that the intent of Congress in passing the "Indeterminate Sentence Act," *supra,* was to include all crimes for which a sentence of more than a year could be imposed. While the "Indeterminate Sentence Act" uses the words 'convicted of a felony', it is obvious from reading the Report of the Committee of the District of Columbia, to accompany the bill 'To establish a board of Indeterminate Sentence and Parole for the District of Columbia', that the Congress intended the Act to include all offenses for which the penalty might be more than a year. In the paragraphs setting forth the purpose of the bill, the Report states as follows:

> "The object of the proposed legislation is to establish in the District of Columbia a board of indeterminate sentence and parole, with a view to bringing the procedure of the District of Columbia into conformity with the best modern penological practice. The bill provides for the imposition of indeterminate sentences upon persons*found guilty of crimes* within the District. This system is widely used throughout the United States and is generally regarded as an essential factor in penological reform."

As the Courts recognize that Criminal Contempt convictions under section 268 of the Judicial Code are crimes, it does not seem to matter whether the sentences imposed

upon appellant were for felonies or not, in order to entitle him to be sentenced under the "Indeterminate Sentence Act."

In conclusion on this question, it is respectfully contended the judgment of the United States Court of Appeals should be reversed, and the appellant remanded before the District Court for resentence, if that Court should so desire.

## QUESTION II

Whether the District Court had jurisdiction under section 268 of the Judicial Code to try, convict and sentence petitioner as for a criminal contempt, when it is admitted by respondent the alleged misbehavior was not such as made him liable to punishment after the decision of this Court on April 14, 1941, in *Nye* v. *United States.*

## SUMMARY OF ARGUMENT ON QUESTION 2

The lower court erred in discharging the writ of habeas corpus, dismissing the petition for writ of habeas corpus, and remanding the petitioner to the custody of the appellee, for the reason that all legal sentences imposed upon him have been fully served.

The sentences imposed in the Criminal Contempt cases involved here, were illegal and void because the trial court had no jurisdiction to try, convict and sentence the petitioner, and further because his constitutional rights were denied in the proceedings. Habeas Corpus was the proper remedy to obtain discharge of petitioner, who is being illegally detained, restrained, and punished in alleged criminal contempt proceedings, in which cases the trial court did not have jurisdiction to try, convict and sentence him.

Section 268 of the Judicial Code limits the power of Federal Courts to punish for Criminal Contempts. Such power, according to the statute, "shall not be construed to extend to any cases except the *misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice.*"

The appellee admitted at the hearing of the writ of habeas corpus, and the face of the record shows conclusively that the acts alleged to have been committed by the petitioner, occurred some days prior to the trial of the case pending against him, some miles distant from the Court House, and not in the physical presence of the Court.

The Supreme Court of the United States, in the case of *Nye et. al. v. United States,* decided April 14, 1941, construed section 268 of the Judicial Code. The Court held that the words "so near thereto" are to be construed as geographical terms. It construed the words "misbehavior of any person in their presence" in this section to mean that the power of federal courts to punish for criminal contempts "can only be exercised to insure order and decorum" in court. The conduct charged against the petitioner in the petition for rule to show cause why he should not be punished for criminal contempt under section 268 of the Judicial Code does not fall within these terms, as they have been construed by the Supreme Court of the United States, and do not constitute Criminal Contempt in violation of that section.

The face of the record further shows that the petitioner has fully served all valid sentences imposed upon him.

As the court did not have jurisdiction to try, convict and sentence petitioner, because the conduct charged against him does not constitute contempt within section 268 of the Judicial Code, and because he has served all

valid and legal sentences imposed upon, him the petitioner should have been discharged from custody by the lower court on the writ of habeas corpus which had been issued to inquire into the detention of him.

**ARGUMENT ON QUESTION 2**

The commitment of the petitioner to serve the sentences imposed in the alleged criminal Contempt cases hereinbefore described, by the trial court, without jurisdiction or legal authority therefor was invalid, and where it is shown, as here, that there was no ground for the contempt charged, the petitioner is entitled to discharge from custody under the writ of habeas corpus.

*Elliott* v. *United States*, 23 App. D. C. 456
*Holman* v. *Austin*, 34 Tex. 668.

The order of commitment was void and the trial court did not have jurisdiction to try and sentence the petitioner. Where the evidence shows the order of commitment to be void, or that an offense could not have been committed by reason of the undisputed facts, the prisoner should be released on a writ of habeas corpus.

*Palmer* v. *Colladay*, 18 App. D. C. 426.

As the Court had no jurisdiction to try the petitioner, or if his constitutional rights have been denied in its proceedings, the remedy of habeas corpus is available.

*Bowen v. Johnston*, 306 U. S. 19.
*Johnson* v. *Zerbst*, 304 U. S. 458.
*Moore* v. *Dempsey*, 261 U. S. 86.
*Re Bonner*, 151 U. S. 242.
Re Snow, 120 U. S. 274.
*Ex Parte Crow Dog*, 109 U. S. 556.
*Ex Parte Lange*, 18 Wall, 163.

In the case of *Ex Parte Snow,* 120 U. S. 274, the Supreme Court held that the lower court was without jurisdiction to inflict punishment in respect of more than one of the convictions because the indictments were for a continuing offense; that, the want of jurisdiction appearing on the face of the record, the objection may be taken on habeas corpus.

In the case of *Ex Parte Terry,* 128 U. S. 289, counsel for petitioner contended that the circuit court failed to take such steps as were necessary to give jurisdiction of the person of the prisoner at the time the order was made committing him to jail for contempt; and therefore, that the order was illegal, and the writ of habeas corpus should be awarded. The Supreme Court in passing on this proposition, stated:

> "If this position is sound, the conclusion stated would necessarily follow; for while the writ may not be used to correct mere errors or irregularities, however flagrant, committed within the sphere of the authority of the court, it is an appropriate writ to obtain the discharge of one imprisoned under the order of a court of the United States which does not possess jurisdiction of the person or of the subject matter." To the same effect, see:

*Ex Parte Lange,* 85 U. S. 163.
*Ex Parte Parks,* 193 U. S. 18.
*Ex Parte Fisk,* 113 U. S. 713.
*Ex Parte Curtis,* 106 U. S. 371.

In *Ex Parte Fisk,* 113 U. S. 713, the Supreme Court held that the Circuit Court was without authority to make the orders for the examination of petitioner, and equally without authority to enforce these orders by process for

contempt, and that he should have been released on a writ of habeas corpus. The Court stated on this proposition as follows:

> "When, however, a court of the United States undertakes, by its process of contempt to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for contempt is equally void. It is well settled now, in the jurisprudence of this court, that when the proceedings for contempt in such a case results in imprisonment, this court will, by its writ of habeas corpus discharge the prisoner. It follows, necessarily, that on a suggestion by the prisoner, that, for the reason mentioned, the order under which he is held is void, this court will, in the language of the statute, make 'inquiry into the cause of the restraint of liberty'."

In the case of *Ex Parte Cuddy*, 131 U. S. 280, the Supreme Court in passing on this point directly, used the following language:

> "If appellant had alleged such facts as indicated that the misbehavior with which he was charged was not such as, under sec. 725 of the Rev. Stat. made him liable to fine or imprisonment, at the discretion of the court, he would have been entitled to the writ, and, upon proving such facts, to have been discharged."

In the case of *Nye, et. al.* v. *United States*, decided by the Supreme Court on April 14, 1941, the Court held that the phrases "misbehavior so near" "as to obstruct the administration of justice" within the meaning of section 268 of the Judicial Code have a geographical connotation. In deciding that the conduct of the petitioner in this case did

not fall within section 268 of the Judicial Code, and that the trial court was without *jurisdiction* to punish for Criminal Contempt the Supreme Court said:

> "The fact that in purpose and effect there was an obstruction in the administration of justice did not bring the condemned conduct within the vicinity of the Court in any normal meaning of the term. It was not misbehavior in the vicinity of the court disrupting to quiet and order or actually interrupting the Court in the conduct of its business. Hence, it was not embraced within section 268 of the Judicial Code. If petitioners can be punished for their misconduct, it must be under the Criminal Code where they will be afforded the normal safeguards surrounding criminal prosecutions."

The alleged misbehavior with which appellant was charged and for which he was convicted and sentenced, was not such as, under section 268 of the Judicial Code made him liable to punishment. The alleged misbehavior did not constitute a violation of that section, and the appellant should have been discharged from custody on the writ of habeas corpus issued in his behalf.

The question here is whether the conduct of appellant for which he is now imprisoned, constituted "misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice", within the meaning of section 268 of the Judicial Code. For it is obvious that unless the alleged misbehavior is included in those terms, the trial Court was without jurisdiction to try, convict and sentence appellant, and he should have been discharged from custody on the hearing of his writ of habeas corpus.

The history of the power of Federal Courts to punish for Criminal Contempts, makes abundantly clear that

abuses arose from the use of Criminal Contempt power, whether it was possessed or assumed.

*Nye* v. *United States, supra.*

Section 268 of the Judicial Code derives from the Act of March 2, 1831 (4 Stat. 487). The latter act, which limited the Federal Courts in their power to punish for Criminal Contempt, was passed solely because of the abuses practiced by certain courts in exercising real or imaginary power under authority of the Act of 1789 (1 Stat. 73). The act of 1789 provided as follows:

> "All the said courts shall have power to punish, by fine and imprisonment, at the discretion of the said courts, all contempts of authority in any cause or hearing before the same."

The direct cause for the passage of the act of Congress of March 2, 1831, was the celebrated Peck-Lawless contempt case. The contempt proceedings received wide publicity and finally culminated in the preferring of articles of impeachment against Judge Peck by the House of Representatives, and his acquittal by the Senate after a sensational trial. It appeared he had acted under blanket provisions of the Act of 1789. It was perfectly obvious that a great injustice had been committed under the provisions of this act, because of the wide authority it conferred, and it was also obvious, in view of the arbitrary character of contempt procedure, that similar happenings would likewise occur.

*Nye v. United States, supra.*
*Thomas, Problems of Contempt of Court.*
*Stansbury, Trial of James H. Peck* (1883).

Section 2 of the Act of 1831, from which section 135, Criminal Code (35 Stat. 1113; 18 U. S. C. sec. 241) derives,

makes the alleged misbehavior charged to petitioner a specific criminal offense, punishable by indictment, and giving the alleged contemnor the right of trial by jury.

It is readily apparent that the misconduct alleged in the case at bar was meant to be, and is only included in section 135, Criminal Code, and is not an offense for which the trial Court could punish as for a Criminal Contempt.

*Nye v. United States, supra.*

The "joker" in the Act of 1831 appeared to be the use of the wording "or so near thereto as to obstruct the administration of justice." There have been many instances in which the construction of that language by many Federal Courts has resulted in the assumption, as here, of Criminal Contempt power, to punish for alleged misbehavior not contemplated or included in that act or section 268 of the Judicial Code. By the use of such powers, the trial court in this case assumed jurisdiction over the petitioner and the subject matter which is not included in the authority given by Section 268 of the Judicial Code.

Congress was intent on curtailing the power of the Federal Courts to punish for Criminal Contempt, and further intended to narrow the category of criminal cases which could be tried without a jury.

*Nye v. United States, supra.*

The construction of Section 268 of the Judicial Code depends upon the interpretation given to the terminology, "misbehavior so near" the presence of the Court "as to obstruct the administration of justice." There have been many interpretations given that language by Circuit Courts and the Supreme Court of the United States. Despite other opinions by even the Supreme Court, the Nye case, *supra,* construed the words at issue as follows:

"The question is whether the words 'so near thereto' have a geographical or causal connotation. Read in their context and in the light of their ordinary meaning, we conclude that they are to be construed as geographical terms. In *Ex Parte Robinson,* 19 Wall. 505, at page 511, it was said that as a result of those provisions the power to punish for contempts 'can only be exercised to insure order and decorum' in court. 'Misbehavior of any person in their presence' plainly falls in that category."

*Ex Parte Terry,* 128 U. S. 289.
*Ex Parte Cuddy,* 131 U. S. 280.
*Ex Parte Savin,* 131 U. S. 267.

The phrase 'so near thereto as to obstruct the administration of justice' likewise connotes that the misbehavior must be in the vicinity of the Court.

*Nelles & King, Contempt by publication,*
28 Col. L. Rev. 525, 530.
*Nye v. United States, supra.*

It is not sufficient that the misbehavior charged has some direct relation to the work of the Court. "Near" in this context, juxtaposed to "presence," suggests physical proximity not relevancy. In fact, if the words "so near thereto" are not read in the geographical sense, they come close to being surplusage. There may, of course, be many types of "misbehavior" which will "obstruct the administration of justice" but which may not be "in" or "near" to the "presence" of the Court. Broad categories of such acts, however, were expressly recognized in section 2, of the Act of March 2, 1831, and subsequently in section 135 of the Criminal Code.

*Nye v. United States, supra.*

It has been held that an act of misbehavior though included in section 135 of the Criminal Code, may also be a contempt *if* committed in the 'presence'' of the court.

*Nye v. United States, supra.*
*Ex Parte Savin, Supra.*

''So near thereto'' cannot be given a casual meaning, because then section 268 by the process of Judicial construction will have regained much of the generality which Congress in 1831 emphatically intended to remove.

*Nye v. United States, supra.*
*Thomas, Problems of Contempt of Court,* c. 7.

If that phrase is not restricted to acts in the vicinity of the Court but be allowed to embrace acts which have a ''reasonable tendency'' to ''obstruct the administration of justice'' then the conditions which Congress sought to alleviate in 1831 have largely been restored. The result will be that the offenses which Congress designated as true crimes under section 135 of the Criminal Code, will be absorbed as contempts wherever they may take place.

*Nye v. United States, supra.*
*Fox, The History of Contempt of Court,* (1927) c. 9.

Attention should be given the case of *Coll v. United States,* 8 F. (2d) 20, decided in 1925, in which the Circuit Court of Appeals of the First Circuit, in the face of the then authority to the contrary, held that an attempt to bribe a witness out of court (4 miles from the court) could not be punished as a criminal contempt under section 268 of the Judicial Code. It should be noted that this decision was rendered after the former precedent of *Toledo Newspaper Co. v. United States,* 247 U. S. 402, and holds the same as the Nye case. The Toledo Newspaper Company

case and all precedents followed by that decision were directly reversed and overuled by the decision in *Nye v. United States, supra.*

Excerpts from the minority opinion in the Nye case, written by Mr. Justice Stone, are cited here because they help to elucidate the decision of the Court. Justice Stone stated as follows:

> "It is not denied that the distance of the present contemptuous action from the Court in miles did not lessen its unjurious effect, and in that sense it was "near" enough to obstruct the administration of justice. The opinion of the Court supports its conclusion on the ground that "near" means only geographical nearness and so implicitly holds that no contempt is summarily punishable unless it is either in the presence of the court or is some kind of physical interference with or disturbance of its good order.*** From all this it seems to follow that the surreptitious tampering with witnesses, jurors or parties in the presence of the court, although unknown to it, would be summarily punishable because in its presence, but that if it took place outside the court room or while the witness, juror or party was on his way to attend court it would not be punishable because geographical nearness is not an element in making the contemptuous action an obstruction to justice."

The Nye case, *supra,* conclusively supports and is positive authority for appellant's contention that the alleged misbehavior charged to him does not fall within the terms of section 268 of the Judicial code; that the trial court did not have jurisdiction to try, convict and sentence him as for a criminal contempt; and that his detention is illegal when attacked and tested by a writ of habeas corpus. The Supreme Court in that case reversed the theory of Criminal Contempt powers, as it was thought to be possessed by the

trial court under section 268 of the Judicial Code. In the Nye case, as here, the petitioners were charged with misbehavior some miles distant from the court, which conduct tended to obstruct the administration of justice. The concluding paragraph of the Court's opinion follows:

> "We may concede that there was an obstruction in the administration of justice, as evidenced by the long delay, and large expense which the reprehensible conduct of petitioners entailed. And it would follow that under the 'reasonable tendency' rule of *Toledo Newspaper Co. v. United States, supra,* the court below did not err in affirming the judgment of conviction. *But for the reasons stated that decision must be overruled.* The fact that in purpose and effect there was an obstruction in the administration of justice did not bring the condemned conduct within the vicinity of the court in any normal meaning of the term. It was not misbehavior in the vicinity of the Court disrupting to quiet and order or actually interrupting the court in the conduct of its business. *Savin, Petitioner, supra,* at page 278. Hence, *it is not embraced within section 268 of the Judicial Code.* If petitioners can be punished for their misconduct, it must be under the criminal Code where they will be afforded the normal safeguards surrounding criminal prosecutions."

The United States Court of Appeals for the District of Columbia held that the District Court had jurisdiction in 1939 to sentence petitioner, but would not have had such jurisdiction on and after April 14, 1941, the date this Court delivered the opinion in the Nye case, *supra.* We respectfully contend the Court of Appeals was in error in holding that the petitioner is not entitled to relief for the reasons given by that Court. We contend further that the District Court never had the power and jurisdiction to try and convict and sentence the petitioner.

While it is admitted by petitioner that this Court in some contract cases refused to give a retroactive application to an overruling decision, it has (as have other courts) held that an overruling decision should be given a prospective application to the detriment of a prisoner and defendant. Indeed this Court's reasoning in the cases giving prospective application to overruling decisions in certain contract cases is based on principles of justice, and to fail to give the petitioner relief would mean he must continue to serve a sentence imposed in violation of the holding of this Court in *Nye* v. *United States, supra.* It is unreasonable and unjust not to afford this petitioner relief from serving the balance of a sentence which this Court has decided could not have been legally imposed upon him.

In conclusion on this question, it is respectfully contended the judgment of the United States Court of Appeals should be reversed, with orders that the petitioner be discharged from custody.

## CONCLUSION

Wherefore, it is respectfully contended that the petition for a writ, or writs, of certiorari should be granted.

Respectfully submitted,

MYRON G. EHRLICH

*Attorney for Petitioner,*
Washington, D. C.

# Supreme Court of the United States

OCTOBER TERM, 1941

## No.

EMMETT R. WARRING, PETITIONER

*vs.*

RAY L. HUFF, GENERAL SUPERINTENDENT DISTRICT PENAL INSTITUTIONS

## No.

EMMETT R. WARRING, PETITIONER

*vs.*

JOHN B. COLPOYS, UNITED STATES MARSHAL

### APPLICATION FOR BAIL

The petitioner respectfully moves this Court to order him enlarged upon reasonable recognizance with sufficient surety, pending review of the judgments of the United

States Court of Appeals for the District of Columbia, for the following reasons:

The petitioner will have served the maximum sentences, imposed upon him by January 23, 1942, and it seems improbable this court will render a decision before that time in these cases.

The petitioner and his counsel honestly and sincerely believe a writ of certiorari will be granted and the decisions of the lower court will be reversed.

We further contend that no harm will be done the United States if this petitioner is enlarged on bail pending review of the judgments of the lower court, but that irreparable injury and confinement will accrue to petitioner if his contentions are decided correct by this Court, in the event he is confined pending review of the judgments of the lower Court.

That if this Court decides against him, he can be forced to be committed for the unserved remainder of his sentence, but the issues involved will probably be moot because of time, unless petitioner is enlarged on bail pending review of the lower Court's judgments.

EMMETT R. WARRING
*Petitioner*

By MYRON G. EHRLICH

*Attorney for Petitioner,*
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Washington, D. C.

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# In the Supreme Court of the United States

OCTOBER TERM, 1941

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No. 654

EMMETT R. WARRING, PETITIONER

*v.*

RAY L. HUFF, GENERAL SUPERINTENDENT, DISTRICT PENAL INSTITUTIONS

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No. 655

EMMETT R. WARRING, PETITIONER

*v.*

JOHN B. COLPOYS, UNITED STATES MARSHAL

---

*ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA*

---

**BRIEF FOR THE RESPONDENTS IN OPPOSITION**

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**OPINIONS BELOW**

The opinions of the Court of Appeals (R. 44–51) are not yet reported.

### JURISDICTION

The judgments of the Court of Appeals were entered July 29, 1941 (R. 52–53). The petition for writs of certiorari was filed September 25, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

### QUESTIONS PRESENTED

1. Whether a sentence under the Summary Criminal Contempt Statute, which prescribes no maximum punishment, comes within the terms of the Indeterminate Sentence Act for the District of Columbia, which provides that a person convicted of a felony shall be sentenced for a maximum period not exceeding that fixed by law and for a minimum period not exceeding one-fifth of that maximum.

2. Whether the decision of this Court in *Nye* v. *United States,* 313 U. S. 33, should be applied retroactively so as to invalidate certain sentences involved in the instant case.

### STATUTES INVOLVED

Section 3 of the Act of July 15, 1932, 47 Stat. 696, 697 (D. C. Code, 1929, Supp. V, Title 6, Sec. 453), provides:

> In imposing sentence on a person convicted in the District of Columbia of a felony, the justice or judge of the court imposing such sentence shall sentence the person for a maximum period, not exceeding the maximum fixed by law, and for a mini-

> mum period not exceeding one-fifth of the maximum period fixed by law, and any person so convicted and sentenced may be released on parole as herein provided at any time after having served the minimum sentence.

Section 268 of the Judicial Code (28 U. S. C. Sec. 385), called herein the Summary Criminal Contempt Statute, provides:

> The said courts shall have power * * * to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts.

## STATEMENT

Petitioner, who had the advice and assistance of counsel, pleaded guilty in the District Court of the United States for the District of Columbia to and was sentenced for four criminal contempts, which are here designated as Cases Nos. 98, 99, 100, and 101 (R. 40–41). He was also sentenced upon a plea of guilty upon a charge of criminal conspiracy (R. 22–23).

It appears from the petitions of the United States Attorney for a rule to show cause that the contempt charged in No. 98 was that petitioner endeavored to influence, by attempted bribery and other means, the vote of a prospective petit juror in a pending criminal case in which petitioner was a defendant (R. 24–27), and that in No. 99 he was charged with investigating the possibility of influencing another prospective petit juror for the same purpose (R. 28–31). The petitions also disclose that while petitioner's misconduct took place in the District of Columbia, it occurred prior to the trial of the criminal case and at some distance from the courthouse.[1]

Petitioner was given a sentence of one year and one month in No. 98 (R. 40); six months in No. 99, to run concurrently with the sentence in No. 98 (R. 40); one year and one month in No. 100, to begin upon the expiration of the sentence in No. 98 (R. 41); and six months in No. 101, to run concurrently with the sentence in No. 98 (R. 41). He was also sentenced to imprisonment for from three to nine months upon the conspiracy charge, which sentence was to begin upon the expiration of the sentence imposed in No. 100 (R. 23).[2]

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[1] Since petitioner does not question the power of the District Court to proceed under the Summary Criminal Contempt Statute in Cases Nos. 100 and 101, it is unnecessary to summarize the charges in those cases.

[2] Petitioner's term of imprisonment will expire on January 23, 1942, he having forfeited any good time allowance because of misconduct (R. 23).

Petitioner filed petitions for writs of habeas corpus in the District Court of the United States for the District of Columbia (R. 2–4, 12–14, 18–21). The writs issued (R. 4–5, 15) and answers to the petitions and returns to the writs were filed on behalf of the respondents (R. 5–7, 16–18, 21–23). The District Court, after a hearing, discharged the writs, dismissed the petitions, and remanded the petitioner to the custody of respondents (R. 8–9, 41–42). The Court of Appeals affirmed the orders of the District Court (R. 44–53).

## ARGUMENT

### I

Petitioner urges that he was invalidly sentenced in contempt proceedings 98 and 100 because the sentences were for felonies and were not imposed in accordance with the Indeterminate Sentence Act for the District of Columbia (Pet. 15–23).

As the Court of Appeals pointed out, it is unprofitable to endeavor to determine the nominalistic question whether a criminal contempt is an offense, crime, felony or *sui generis,* since it is patently impossible to apply the Indeterminate Sentence Act to sentences for criminal contempts, and, consequently, it cannot be thought that Congress intended that such sentences should fall within the statute's terms (R. 45). The Indeterminate Sentence Act provides that the judge in imposing sentence for a felony shall prescribe a maximum period, not exceeding the maximum fixed by

law, and a minimum period not exceeding one-fifth of that maximum. The Summary Criminal Contempt Statute, however, specifies no maximum; it leaves the sentence entirely within the discretion of the trial judge. It is, of course, impossible to determine one-fifth of a nonexistent maximum. The decision of the Court of Appeals was clearly correct.[3]

In *Anderson* v. *Rives,* 85 F. (2d) 673 (App. D. C.), the court held, for a like reason, that the Indeterminate Sentence law does not apply to second degree murder, for which the maximum punishment is life.

II

Petitioner also contends, in effect, that this Court's decision in *Nye* v. *United States,* 313 U. S. 33, rendered on April 14, 1941, retroactively invalidated the sentences imposed upon him on February 24, 1939, in Cases Nos. 98 and 99 (Pet. 25–35).

In the *Nye* case, it is true, this Court in ruling that the analogous misconduct of Nye and Mayers did not come within the purview of the Summary Criminal Contempt Statute, reversed their convictions and held that if they could be punished for

[3] It does not follow from the court's decision that persons in the situation of petitioner are deprived of an opportunity to apply for parole. Apparently by analogy to the Federal Parole Act (18 U. S. C., Sec. 714), petitioner was permitted, after he had served one-third of the aggregate of his sentences, to apply for parole. This application was denied, as was a later application.

the misconduct, it must be under the provisions of the Criminal Code, with the normal safeguards surrounding criminal prosecutions, even though it conceded that under its prior decision in *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402, which it then overruled, the court below did not err in affirming the judgment of conviction (pp. 52–53). The Court, therefore, gave its decision a retroactive effect in that it freed Nye and Mayers, although their misconduct was punishable summarily under the *Toledo Newspaper* case. But in the *Nye* case this Court's action was taken in an appellate proceeding to review a judgment of conviction, not in a collateral proceeding. In another case the Circuit Court of Appeals for the Fifth Circuit, on the basis of the *Nye* decision, discharged a defendant whose misconduct was analogous to that of Nye and Mayers, but the Government did not apply for certiorari since the court's action was taken upon an appellate review of the judgment of conviction. *Wimberly* v. *United States,* 119 F. (2d) 713.

No such consideration motivates a declaration of retroactivity in the present case. On the contrary, there are compelling reasons against retroactivity.

The *Nye* decision did not absolve from punishment activity formerly condemned; it held only that another type of procedure was requisite. The attack upon petitioner's sentences is a collateral attack. These sentences, rendered over two years

prior to the *Nye* decision, were fully justified by the decision of this Court in the *Toledo Newspaper* case and by its intervening decisions.[4] Petitioner, although represented by counsel, did not question these decisions in the contempt proceeding. Indeed, evidently upon the advice of counsel, he pleaded guilty. Realistically, from the standpoint of the normal safeguards surrounding criminal prosecutions, he lost nothing by being proceeded against under the Summary Criminal Contempt Statute rather than under the Criminal Code. It is evident that in both the cases involved (Nos. 98 and 99) other persons were associated with him in his endeavors to influence prospective petit jurors (R. 24–30). Consequently, he could have been prosecuted for a conspiracy under Section 37 of the Criminal Code (18 U. S. C., Sec. 88) corruptly to influence petit jurors or to obstruct the due administration of justice, in violation of Section 135 of the Criminal Code (18 U. S. C., Sec. 241). Under Section 37 he could have been imprisoned for two years. He was actually sentenced to imprisonment for one year and one month. It is true that he would have had the benefit of an indictment based on probable cause instead of a petition by the United States Attorney for a rule to show cause, but the United States Attorney is a responsible official, he swore to his petition, and the plea of guilty

[4] *Craig* v. *Hecht*, 263 U. S. 255; *Sinclair* v. *United States*, 279 U. S. 749.

makes it manifest that there was adequate basis for the petition. Moreover, it is by no means certain that the United States Attorney could not have proceeded by an indictment under the Summary Criminal Contempt Statute (*Gompers* v. *United States,* 233 U. S. 604, 610–611, 612), for which there obviously would have been probable cause. Since, with the advice of counsel, petitioner believed that there was no defense to the Government's case, it is not to be assumed the plea would have been different. Nor is it to be supposed that a different course of action would have been taken if petitioner had been indicted under the Criminal Code. With a plea of guilty to such an indictment, petitioner, of course, would not have been entitled to a jury trial, so he did not suffer on that score because he was not indicted under the Criminal Code. In summary, since the misconduct of petitioner occurred less than three years ago (R. 24–30) and is yet indictable under the Criminal Code (18 U. S. C., Sec. 582), the net effect of a sustaining of petitioner's contention that the *Nye* decision should be applied retroactively so as to invalidate his sentences would be merely to require the institution of another proceeding which should have no different result. There is, of course, no absolute certainty as to this, but we are not dealing here with a direct attack on the conviction but with the elements to be considered in de-

termining the retroactive application of the *Nye* decision.

This and other courts have not hesitated by various formulae to disregard traditional concepts as to the retrospective effect of overruling decisions or, analogously, declarations of statutory invalidity, where the ends of justice require it. *Gelpcke* v. *City of Dubuque*, 1 Wall. 175, and *Chicot County Dist.* v. *Bank*, 308 U. S. 371.[5] As is apparent from the articles cited in footnote 5 and the decisions they discuss, the movement toward a reexamination in each case of the ancient doctrines has not been limited to cases in which contract or property rights are involved, but has extended also to criminal cases.[6] There are several decisions in the state courts in which defendants have been protected against a retroactive change in construction of a penal statute. See, e. g., *State* v. *Bell*, 136 N. C. 674; *State* v. *O'Neil*, 147 Ia. 513; *State* v. *Jones*, 44 N. M. 623; *State* v. *Longino*, 109 Miss. 125; *Odom* v. *State*, 132 Miss. 3. The plainest principles of justice demanded that defendants

[5] The numerous authorities are collated and discussed in Snyder's *Retrospective Operation of Overruling Decisions*, 35 Ill. L. Rev. 121, Freeman's *The Protection Afforded Against the Retrospective Operation of an Overruling Decision*, 18 Col. L. Rev. 230, and Boskey & Braucher's *Jurisdiction on Collateral Attack, October Term, 1939*, 40 Col. L. Rev. 1006.

[6] 18 Col. L. Rev., pp. 245–250; 35 Ill. L. Rev., pp. 142–143.

be not penalized for acts which under existing decisions were not criminal. Conversely, there is no reason why the overruling decision should be applied to the benefit of a defendant where the ends of justice would not be served. If a state court may, consistent with the Federal Constitution, refuse to make an overruling decision retroactive (*Gt. Northern Ry.* v. *Sunburst Co.*, 287 U. S. 358, 364–365), it cannot be doubted that a Federal court has a like power. If, as we submit, the *Nye* decision should not, in view of the circumstances, be applied retroactively to petitioner's case, there can be no doubt that there is no jurisdictional problem in connection with the sentences in cases Nos. 98 and 99, and that the petition for writ of habeas corpus was properly denied.[7]

It may also be pointed out that so far as we can ascertain petitioner's case is an isolated one. In view of the relatively short sentences given in criminal contempt cases it is unlikely that many other contemnors charged with misconduct analogous to that in the *Nye* case are still incarcerated.

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[7] If this Court should grant the petition for writ of certiorari, it would seem that it might well eliminate from its consideration the sentence in Case No. 100, since the only point urged in connection with that sentence is that it should have been imposed in accordance with the Indeterminate Sentence Law, a point, we believe, to be patently without merit.

## CONCLUSION

The case was correctly decided below and presents, undoubtedly, an isolated situation. We therefore respectfully submit that the petition for writs of certiorari should be denied.

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